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No. 1008

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

B & G ELECTRIC COMPANY,
Petitioner

v.

G. E. BASS & COMPANY, INC.,
Respondent

Petition for Writ of Certiorari

To the United States Court of Appeals,
Fifth Circuit

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The Daily News, Memphis, Tenn., 4/21/58—50c.

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To the United States Court of Appeals,
Fifth Circuit

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner is very much aggrieved by the decision of the United States Court of Appeals, Fifth Circuit, in this cause and prays that a Writ of Certiorari issue to review its opinion and action in the case of B & G Electric Company v. G. E. Bass & Company, Inc., No. 16,936 in said Court.

OPINION BELOW

An opinion and judgment were entered by the United States Court of Appeals, Fifth Circuit, on Februay 25, 1958, (not yet published), and on April 1, 1958, it entered an order denying a Petition to Rehear without opinion. A copy of the said opinion is printed in full as Appendix A, the judgment as Appendix B and the order denying Petition to Rehear as Appendix C.

JURISDICTION

The opinion of the United States Court of Appeals, Fifth Circuit, was entered on February 25, 1958, and on petition to rehear an order denying the same was entered on April 1, 1958.

Jurisdiction of this Court is invoked under the provisions of Chapter 646 of the Act of June 25, 1948; 28 U.S.C.A., Sec. 1254(1). Jurisdiction of the United States Court of Appeals affirmatively appears upon the record.

QUESTIONS PRESENTED

I

Is an indemnitor liable to indemnitee under a contract of indemnity *against loss or damage* where the indemnitee has suffered no loss or damage?

II

Is a party entitled to maintain an action under a contract of indemnity where he was not a party to the agreement and where it is not shown that he has some interest in it or that it was made for his benefit?

III

Is a party entitled to a summary judgment for damages where there is a genuine issue of fact with respect to said damages?

STATEMENT OF THE CASE

The original suit was a common law action filed by one James R. Henderson, a citizen and resident of the State of Tennessee, against G. E. Bass & Company, Inc., a Mississippi Corporation, and McQuay, Inc., a Minnesota Corporation, in the United States District Court for the Northern District of Mississippi, seeking damages in excess of

$3,000.00 for personal injuries which he alleged resulted from the negligence of defendants G. E. Bass & Company, Inc., and McQuay, Inc. (R. 4, 5).

At the time of his alleged injuries plaintiff was an employee of petitioner herein. Plaintiff had been employed in Tennessee and received full compensation for his alleged injuries under the provisions of the Workmen's Compensation Act of Tennessee (R. 5).

The original defendant G. E. Bass & Company, Inc., moved the Court to dismiss the complaint of plaintiff summarily or, in the alternative, to be permitted to make and sue petitioner as a third party defendant, alleging a contract of indemnity between the parties. The District Court declined to dismiss the suit but permitted G. E. Bass & Company, Inc., to bring petitioner into the controversy as a third party defendant (R. 5, 6, 7).

On September 24, 1956, petitioner moved the District Court to be dismissed as third party defendant which motion was sustained and the cause was dismissed as to petitioner to the extent of recovery of damages against it resulting from the negligence of petitioner, its agents, servants or employees. No recovery could have been had of petitioner as the result of the negligence of any one else, and, therefore, the cause was completely and finally dismissed against petitioner except that the Court reserved judgment as to the liability of B & G Electric Company under the *alleged* indemnity agreement (R. 27, 28, 29).

Your petitioner denied any negligence on its part and answered that it had fully complied with the Workmen's Compensation Act and alleged that Henderson's exclusive remedy was under that act and that he had been fuliy compensated as therein provided. Your petitioner filed a cross action against G. E. Bass & Company, Inc., for twenty-six

thousand, one hundred eighty-one dollars and eighty-three cents ($26,181.83) (R. 7).

G. E. Bass & Company, Inc., answered the cross complaint of B & G Electric Company, your petitioner herein, by admitting the indebtedness but averred that under its alleged contract of indemnity with B & G Electric Company, B & G Electric Company was obligated for the payment of costs and attorney's fees (R. 7, 8).

On June 10, 1957, there was a trial of plaintiff's personal injury action against G. E. Bass & Company, Inc., and McQuay, Inc., which was dismissed by the Court and from which no appeal was prosecuted (R. 8, 9).

On June 17, 1957, the Court heard the cross complaint of B & G Electric Company against G. E. Bass & Company, Inc., for $26,181.83 and awarded your petitioner a judgment for the full amount sought but also awarded G. E. Bass & Company, Inc., a judgment for $2,000.00 for respondent's alleged attorney fees (R. 9).

The claim of petitioner was admitted as due and owing and judgment was confessed by respondent. Respondent's claim, on the other hand, was very vigorously denied by petitioner and no affirmative proof was introduced relating thereto. The judgment against petitioner in favor of respondent was predicated solely upon the statement of respondent's attorney of his theory of his claim (R. 12).

Petitioner appealed from the judgment awarded against it to the United States Court of Appeals, Fifth Circuit. Upon brief and argument, the Court affirmed the action of the District Court on the ground that petitioner was liable to respondent for attorney's fees under an alleged contract of indemnity against loss or damage even though respondent had suffered no such loss or damage (Appendix A, page 5, par. 3).

REASONS WHY THE WRIT SHOULD BE GRANTED

This is not a case where the jurisdiction of this Court is being invoked on a novel theory of law or upon the construction of constitutional or statutory provisions. It is a case where the United States Court of Appeals, Fifth Circuit, has adopted a novel and unusual theory of law in substitution for the established law of Mississippi and all other jurisdictions, both state and federal, from which reported opinions are available.

It held petitioner liable for attorney fees, under a contract of indemnity against loss or damage to one not a party to the contract, and who had no interest in the contract, when no loss or damage had been suffered, in contravention of the established law of this nation.

Through the impact of its opinion, the Court of Appeals has pressed upon this Court the positive and impelling necessity and urgency of review and consideration for four of the five special and important reasons set out in Rule 19 of this Court, Section 1(b). These are:

1. The Court of Appeals, Fifth Circuit, has rendered a decision in conflict with the decisions of other Courts of Appeals on the same matter.

2. The Court of Appeals in this cause has decided an important state question in a way which is in conflict with applicable state law.

3. The Court of Appeals has decided a federal question in a way which is in conflict with applicable decisions of this Court.

4. The Court of Appeals so far sanctioned the action of the District Court where it departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

ARGUMENT

I

Is an indemnitor liable to indemnitee under a contract of indemnity *against loss or damage* where the indemnitee has suffered no loss or damage?

The cases cited herein, along with literally hundreds of others from many jurisdictions, state and federal, several from the Fifth Circuit, are the basis of, and in accord with, the general rule as declared in American Jurisprudence and corpus Juris Secundum. We have found no case from any jurisdiction contrary to or in conflict with the universal rule of law as follows:

> "The rule of the common law is that to authorize a recovery on a mere bond of indemnity, actual damage must be shown. This rule is limited to simple contracts of indemnity against damages, and does not govern in the case of indemnity against mere liability. Applying the rule, it has been held that a surety cannot have a right of action on a general promise of indemnity *until he has been compelled to pay the debt for which he is bound.* And generally, if the indemnity is against payment of money, *the plaintiff must prove actual payment*, or that which the law considers equivalent to actual payment, *a mere liability to pay not being sufficient.*"
>
> 27 Am. Jur. 470, Sec. 21

> "Where the contract is strictly one of indemnity, that is, one against loss or damages, *the indemnitee cannot recover until he has made payment or otherwise suffered an actual loss or damage*, against which the covenant runs."
>
> 42 C.J.S. 589, Sec. 14C. (1)

There was not a line of evidence introduced at the trial of any loss or damage suffered by either the respondent, G. E. Bass & Company, Inc., or its companion entity, G. E.

Bass & Company, a partnership. The record is devoid of any such evidence. It is admitted by respondent that it never suffered any loss or damage. The Court of Appeals found that "The agreed statement of the case upon which this appeal is submitted does not show payment by Bass of the attorney's fee." (Appendix A, page 5, par. 3, first sentence)

Following the above quotation, the Court of Appeals goes on to ask this question:

"Is the contract one strictly for indemnity, upon which judgment can be awarded only after actual payment?"

After accurately stating the law with reference to contracts of indemnity against loss or damage, in keeping with the universal rule of law relating to contracts of indemnity (actually quoting verbatim one of the authorities cited, i. e., **42 C.J.S. 589, Sec. 14C),** the Court, in its opinion goes on to hold that respondent is entitled to recover under a contract of indemnity against loss or damage even though it has suffered no loss or damage. The Court found (Appendix A, page 6) that respondent had "*incurred*" the expense of an attorney's fee, even though counsel for respondent admits that it had not. But assuming, for the sake of argument, that it had *incurred* this expense, isn't this the same as saying it had a "*liability*" for this expense?

Webster's Dictionary gives the following definition of "incur":

> **"Become liable to; bring down on oneself. • • • Incur emphasizes the idea of liability, and commonly implies voluntary action."**

The contract in question *was not a contract of indemnity against liability*, but merely one against loss or damage.

The Court of Appeals has departed from the law of Mis-

sissippi and the universal rule of law in holding an indemnitor liable to an indemnitee for an alleged liability under a contract of indemnity against loss or damage. The provision of the contract upon which the judgment was predicated is as follows:

> "The Sub-Contractor shall protect and indemnify said Contractor *against any loss or damage suffered* by any one arising through the negligence of the Sub-Contractor or those employed by him, or his agents or servants; he shall bear any expense which the Contractor may have by reason thereof, or on account of being charged therewith." (R. 21)

Respondent was not charged with the negligence of petitioner; it was charged with its own negligence (R. 4, 5 par. 4—R. 8, 9, par.10). It suffered no loss or damage and consequently did not have and could not have any expense by reason thereof.

Reasonable minds can't read into the above quotation an indemnity against liability. It is an indemnity against loss or damage, pure and simple. The Court of Appeals so found it to be, but awarded a judgment against petitioner when no loss or damage had been suffered, the contract to the contrary notwithstanding.

1. The opinion of the Court of Appeals, Fifth Circuit, in this case is in conflict with the following decisions of other Courts of Appeals where the same question was presented:

> "Being only liable, however, as an indemnitor, Ashland's responsibility to Chicle is to compensate it for the loss sustained. That loss will not be suffered until Chicle satisfies the plaintiff's judgment and only then will indemnity be due."
>
> Burris v. American Chicle Co
> 120 F. 2d 218

"A contract to indemnify and hold harmless is not an original covenant to pay, but is rather an undertaking to repay or reimburse the indemnitee or make good to him the actual loss which he may suffer. One of the characteristic differences between a contract of indemnity and one to pay legal liabilities is that upon the former an action cannot be brought and recovery had until the liability indemnified against is discharged; whereas upon the latter the cause of action is complete when the liability attaches."

Central States Grain Co. vs.
Nashville W. & E. Corp.
48 F. 2d 138

2. It is in conflict with the applicable law of the State of Mississippi as enunciated in the following cases:

"There is no doubt as to the general proposition that, in order to recover upon a mere bond of indemnity, actual damage must be shown. If the indemnity be against the payment of money, the plaintiff must, in general, prove actual payment, or that which the law considers equivalent to actual payment. A mere legal liability to pay is not in such case, sufficient." (Quoting with approval from the English case of **Chase v. Hinman,** the language being identical to that as declared to be the general rule in **27 Am. Jur. 470, Sec. 21.)**

Hoy v. Hansborough
1 Miss. Chancery Reports 533

"One question is whether the bond sued on indemnified appellee, the indemnitee therein, against loss alone, or both liability and loss, as surety on the contractor's bond. We think it plain from the language of the bond that the bond was one indemnifying appellee against liability as well as loss, and *therefore appellee did not have to wait until loss occurred before it had a right of action on the bond.*"

Dickson v. U.S.F.&G.
150 Miss. 864 — 117 So. 245

In addition to the above cases quoted, we cite the following Mississippi cases which primarily involve the right of judgment creditors to garnishment against insurance companies, but which distinguish indemnity against liability from indemnity against actual loss and acknowledge the general rule to be the applicable law in the state of Mississippi.

Travelers Ins. Co. v. Inman
157 Miss. 810—126 So. 399

Commercial Cas. Ins. Co. v. Skinner
190 Miss. 533—1 So. 2d 225

3. It has decided a federal question in a way in which is in conflict with the following applicable decisions of this Court:

> "If the contract in the case before us were one of indemnity, the argument of counsel for the plaintiff in error would be conclusive. In that class of cases the obligee cannot recover until he has been actually damnified, and he can recover only to the extent of the injury sustained up to the time of the institution of the suit."

Wicker v. Hoppock
73 U. S. 94

In the case of **Trainor Co. v. Aetna Cas. & Surety Co., 62 F. 2d 487,** the Court of Appeals reached the same conclusion as quoted from the case of **Wicker v. Hoppock,** supra, and this Court granted certiorari in **53 Sup. Ct. 659, 289 U.S. 718.** Upon review the decision of the Court of Appeals (incidentally, the Fifth Circuit) was reversed on other grounds but this Court tacitly approved the opinion of the Court of Appeals upon this principle in **54 Sup. Ct. 1, 290 U. S. 47.**

The Wicker case and the Trainor case are of particular significance since they both limit the indemnity to the

amount of the actual loss or damage suffered at the time of the institution of the respective suits. In the case at bar, there was no claim for damages in the original complaint of respondent and, as a matter of fact, it emphatically and steadfastly denied any liability to the original plaintiff on its own behalf and on behalf of petitioner. Even in its supplemental pleadings it did not claim any actual loss or damages but only suggested that it might have some undetermined liability (R. 8).

II

Is a party entitled to maintain an action under a contract of indemnity where he was not a party to the agreement and where it is not shown that he has some interest in it or that it was made for his benefit?

The general rule is that such a party cannot maintain an action for damages under the contract.

> "One not a party to a contract of indemnity and for whose benefit it was not made cannot maintain an action thereon against the indemnitor."
>
> 27 Am. Jur. 476, Sec. 32

> "Ordinarily the only party entitled to sue on such a contract is the indemnitee or some one in his right, such as assignee, and one not named as indemnitee may not sue on an indemnifying instrument containing no promise to him. A third person, although he may have an interest in the subject matter of the indemnity, and a right of action against the indemnitee, not being a party to the indemnity contract, is not entitled to sue hereon in his own name."
>
> 42 C.J.S. 610, Sec. 29

The record shows very clearly that the so-called contract of indemnity was actually a "Sub-Contract Agreement" entered into between petitioner and G. E. Bass & Company, a partnership, whereas the respondent and the party

in whose favor the judgment for damages was rendered, is an entirely different entity, G. E. Bass & Company, Inc., a corporation (R. 15 through 26).

There is no evidence in the record that the respondent has any interest in this agreement and no evidence was introduced to that effect.

The opinion of the Court of Appeals in this respect is contrary to the common law of this nation, its own prior decisions, the decisions of other Courts of Appeals, the applicable law of the state of Mississippi and the applicable decisions of this Court.

1. Decisions from other Courts of Appeals:

"Without undertaking to lay down a general rule defining when a stranger to a promise between others may sue to enforce it, we are prepared to say that, where there is nothing but the promise, no consideration from such stranger, and no duty or obligation to him on the part of the promisee, he cannot sue upon it."

U.S.F.&G. v. Vermont Marble Co.
16 F. 2d 83

"This Court in United States Fidelity & Guaranty Company v. Vermont Marble Co., 16 F. 2d 83, held that, where one has agreed to indemnify another, a plaintiff not named as the indemnitee may not maintain an action on such indemnifying instrument where there is no promise to such plaintiff in the instrument sued on."

Central States Grain Co. v. Nashville W. & E. Corp.
48 F. 2d 138

"The provisions in the contract between the United States and the Riffle Company were intended for the benefit of the United States and no other person. If the action were on the contract, and not on the bond, the Institute, not being a party to that contract, would have no standing."

United States v. C. A. Riffle Co.
247 F. 374

2. The applicable law of the state of Mississippi:

There appear to be no reported cases from the state of Mississippi with respect to the right of one not a party to an indemnity contract to sue the indemnitor, but the general rule is followed that one without benefit or interest in a contract, and not being a party thereto, cannot maintain a suit thereon, for want of privity.

> "On the proposition of allowance of damage in lieu of specific performance, we think that the appellees cannot recover because the Mississippi Farms Company, *not being a party to the contract*, cannot recover from the appellant the damages it may have suffered in its dealings in this respect."
>
> Jones v. Miss. Farms Co.
> 116 Miss. 295—76 So. 880

3. The applicable decisions of this Court:

By implication, this Court has held that one not a party to an indemnity agreement could not sue thereon. It has held many times that one not a party to a contract (of various types) could not sue, privity being lacking.

In the case of **Berg Shipbuilding Co. v. The United States, 66 Sup. Ct. 89, 326 U. S. 751,** this Court denied certiorari where the Court of Claims had held that one not a party to an indemnity agreement could not sue the indemnitor, that being the major issue presented by the petition for certiorari.

In its brief filed in the Court below, respondent claimed that it was surprised to learn of the error in the names of the parties and averred that this was not raised in the trial court. Actually, it is not a question of error in names at all. The record shows very clearly that petitioner has insisted since the beginning that there was no contract between the parties.

"There was no contract nor common law obligation on the part of B & G Electric Company to defend the suit for G. E. Bass & Company, Inc., nor to pay its expenses in defending such suit." (R. 3—statement of points relied upon by appellant).

"There was no obligation on the part of B & G Electric Company by contract or otherwise to reimburse G. E. Bass & Company, Inc., or its surety for this expense or to assume its obligation in the premises." (R. 4—statement of points relied upon by appellant).

Respondent will insist here, as it did below, that the record shows that the so-called contract of indemnity was between petitioner, B & G Electric Company, and respondent, G. E. Bass & Company, Inc. The record will not bear respondent out in this argument for a copy of the contract will be found appended in the agreed statement of the case (R. 15 through 26) which, if one's eyes are to be believed, make it obvious that respondent corporation was not a party to that contract. Moreover, the Clerk of the Court of Appeals, in indexing the record, properly described it as "Copy of Contract Between G. E. Bass & Co. and B & G Electric Co."

Respondent contends that petitioner is bound by the next to last sentence on page 5 of the Transcript of the Record and is estopped to deny that respondent was a party to the contract. However, when one reads the instrument attached as Appendix "B" (on page 15 of the Record) he will readily find that G. E. Bass & Company, Inc., was not a party to that agreement and that it had no interest in it. It was a contract between respondent's companion entity, G. E. Bass & Company, a partnership, and petitioner. It becomes obvious from a reading of the whole record that this was just one of many statements where the lawyers, the District Judge and the respondent

itself inadvertently referred to the partnership by the corporation's name, and the corporation by the partnership's name. For example:

R. 4—first sentence of last paragraph:

"The original suit was a common law action for the recovery of damages for personal injuries brought by James R. Henderson, as plaintiff, against *G. E. Bass & Company*, and McQuay, Inc., as defendants."

The original suit was obviously brought against *G. E. Bass & Company, Inc.*, and not the partnership.

R. 5—first paragraph:

"At the time of plaintiff's injury, B & G Electric Company was a subcontractor under *G. E. Bass & Company, Inc.*, etc."

If B & G Electric Company was a subcontractor under G. E. Bass & Company, Inc., it is not shown in the record what the terms of the contract were, whether written or oral.

R. 10—first paragraph:

"The attorneys presented same to Bass at its office at Jackson, Mississippi, and *G. E. Bass & Company* issued its check for the said sum."

Immediately following is a copy of the check issued to B & G Electric Company referred to above which shows that it was not issued by G. E. Bass & Company, but by *G. E. Bass & Company, Inc.*

R. 11—first paragraph, from check voucher:

"In full settlement of judgment rendered in favor of B & G Electric Company against *G. E. Bass & Company* on June 17, 1957, etc."

The judgment referred to shows that it was against *G. E. Bass & Company, Inc.*, and not the partnership. (Appendix F to Transcript of the Record, R. 34, 35).

R. 27, 28—order entered in District Court: **In this interlocutory order the Court referred to the defendant as *G. E. Bass & Company* on three occasions while in his orders of June 10 (R. 33) and June 17 (R. 34, 35) the Court referred to it as *G. E. Bass & Company, Inc.***

The quotation "To err is human" is attributed to many authors, including Benjamin Franklin. It is obvious that the District Court erred in his reference to the parties, and in finding that respondent was entitled to recover on an agreement in which it had no interest. It is obvious that the lawyers have erred in their reference to the respondent as G. E. Bass & Company, and to G. E. Bass & Company as G. E. Bass & Company, Inc. It was inadvertent on our part, and on the part of adversary counsel, we are sure. Suffice it to say, there was no contract of indemnity entered into between petitioner and respondent. If respondent will produce such an agreement and file it with this Court, petitioner will withdraw his petition and forget the whole matter, even though the lower Courts erred in awarding a judgment when no loss had been sustained by respondent.

III

As hereinabove set out, respondent introduced no testimony or evidence of any type in support of its claim, either as to its payment of the alleged attorney's fee or its obligation to pay it. Neither did it prove its reasonableness. The award was made upon the statement of counsel for respondent that he had prepared a statement for services in amount of $2000.00 which he intended to present to his client (R. 12).

We feel that the action of the District Court in awarding a judgment without affirmative proof of any type was

such a departure from the accepted and usual course of judicial proceedings as required a reversal by the Court of Appeals; and that the action of the Court of Appeals in sanctioning such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Under Rule 56(c) a summary judgment may be rendered if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

It cannot be contended that respondent was entitled to a judgment as a matter of law. On the basis of the authorities hereinabove cited, respondent's claim should have been denied as a matter of law. The record affirmatively shows that respondent did not suffer the loss for which it was awarded judgment and no affirmative claim was made by the pleading for any specified or definite amount (R. 8).

The record clearly shows that there was a genuine issue of fact with respect to the alleged attorney's fee and that no evidence of any form was introduced upon which this judgment could be predicated. With respect to the judgment rendered against petitioner for respondent's alleged attorney's fee, attorneys for the parties, in paragraph 14 of the Agreed Statement of the Case (R. 11, 12), stipulated to the following:

> "The motion for allowance of attorneys fees for defense of G. E. Bass & Company, Inc. in the suit for damages brought by Henderson was heard on June 17, 1957. *At the hearing, attorneys for G. E. Bass & Company, Inc. offered statement of their fee for services in defending and representing G. E. Bass & Company, Inc. in the sum of Two Thousand Dollars ($2,000.00). B & G Electric Company objected to any amount.* The Court made an award of attorneys fees

in the amount of Two Thousand Dollars ($2,000.00) against B & G Electric Company as shown by the judgment set out in the first paragraph of this agreed statement, and denied expenses. The Court's opinion is referred to in Paragraph 12 hereof and appears attached hereto and marked Exhibit "F". *No other testimony was introduced by either party at the hearing, on June 17, 1957.*"

The summary judgment procedure is not a substitute for the trial of disputed issues of fact and a summary judgment will not be awarded where a genuine issue as to a material fact exists.

Blood v. Fleming
161 F. 2d 292

Fountain v. Filson
69 Sup. Ct. 754 — 336 U. S. 681

Christianson v. Gaines
174 F. 2d 534

Sterneck v. Equit. Life Ins. Co.
237 F. 2d 626

Guerrero v. Amer.-Hawaiian S. S. Co.
222 F. 2d 238

Durasteel Co. v. Great Lakes Steel Co.
205 F. 2d 438

Kasper v. Baron
191 F. 2d 737

CONCLUSION

Learned adversary counsel is a venerable lawyer of the school of persuasion, very astute and very persuasive. He persuaded the lower Courts that his client was entitled to recover under a contract of indemnity against loss or damage, to which his client was not a party and in which he had no interest, when his client had suffered no loss or damage. Any claim that the contract was an indemnity against liability or that his client was a party to the contract is refuted by the record. He persuaded the Court

of Appeals that these questions were not raised in the District Court when the record shows unequivocally that they were.

Our Courts were created to do justice among men, and not to try the abilities of lawyers. We admit to the overpowering talents of adversary counsel but justice can be done in this case only by a review and reversal by this Court. The Courts below have acted contrary to the law of Mississippi, the applicable decisions of the Fifth Circuit and other Courts of Appeals and the applicable decisions of this Court, all as hereinabove set out.

No doubt the argument will be advanced by respondent that by reason of the amount involved, the case is beneath the dignity of this Court. $2,000.00 may be a trifle to respondent, but it means a lot to petitioner in its struggle for existence. Perhaps the amount in dollars and cents is beneath the dignity of this Court, when measured by that scale alone; but three fundamental principles of law are at stake which should be decided by this Court.

For the foregoing reasons, we respectfully submit that this petition for writ of certiorari should be granted and the Court of Appeals, Fifth Circuit, summarily reversed.

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DATED MAY 1, 1958.

Certificate of Service

I, Robert L. Taylor, attorney for petitioner herein, and a member of the Bar of the Supreme Court of the United States hereby certify that copies of the foregoing Petition for Certiorari and Appendices were this day served on adverse party herein in accordance with Supreme Court Rules 21 (1) and 33 by depositing the same in the U. S. Post Office at Memphis, Tennessee, with first class postage prepaid addressed to Honorable Chester L. Sumners, counsel of record of respondent at his post office address, Oxford, Mississippi.

MAY 1, 1958.

Robert L. Taylor.

APPENDIX A.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16936

B & G ELECTRIC COMPANY,
Appellant,

VERSUS

G. E. BASS & COMPANY, INC.,
Appellee.

Appeal from the United States District Court for the Northern District of Mississippi.

(February 25, 1958.)

Before RIVES, TUTTLE and CAMERON, Circuit Judges.

RIVES, Circuit Judge: Liability vel non of the appellant under an indemnity contract for a $2,000.00 attorney's fee incurred by the appellee is all of the present controversy that remains to be decided.

The appellant, B & G, was the electrical work subcontractor under the appellee, Bass, the prime contractor,

for the construction of a building at Grenada, Mississippi. The case turns upon the indemnity provision of the subcontract which reads as follows:

> "The Sub-contractor shall protect and indemnify said Contractor against any loss or damage suffered by any one arising through the negligence of the Sub-contractor or those employed by him, or his agents or servants; he shall bear any expense which the Contractor may have by reason thereof, or on account of being charged therewith; and if there are any such injuries to persons or property unsettled for when the work herein provided for is finished, final settlement between the Contractor and Sub-contractor shall be deferred until such claims are adjusted or suitable special indemnity acceptable to the Contractor is provided by the Sub-contractor."

James R. Henderson, an employee of the subcontractor, B & G, was injured on the job. He collected workmen's compensation from the insurer of B & G, and thereafter brought a common law action for damages against the prime contractor, Bass, charging negligence on the part of Bass. Bass in turn impleaded B & G as a third party defendant under Rule 14(a), Federal Rules of Civil Procedure, alleging that negligence on the part of B & G was the sole proximate cause of Henderson's injury, and invoking the indemnity provision of the subcontract. B & G denied the charge of negligence on its part and filed a counterclaim against Bass for a balance of $26,181.83 due under its subcontract. The amount of that balance was not denied except for the claimed liability of B & G to indemnify Bass for the attorney's

fee incurred in defending the action brought by Henderson.

Henderson's action against Bass was tried separately to the court without a jury and resulted in a judgment for the defendant from which no appeal was prosecuted. The court found that Bass was "guilty of no negligence of any kind."

Thereafter, upon hearing the counterclaim of B & G for the balance due it and the offsetting counterclaim of Bass for indemnity for the attorney's fee, the court awarded B & G the balance due it less, however, the sum of $2,000.00 awarded to Bass as attorney's fee incurred in defending the tort action. The court found as a fact that the sole proximate cause of Henderson's injury was the negligence of the subcontractor B & G.[1]

Judgment was entered for B & G in the reduced sum of $24,181.83. B & G had execution issued and Bass paid

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1 "The Court further finds that the sole proximate cause of the injury in this case was the negligence of the B & G Construction Company in removing the safety precautions which had been put there and knowingly sending a man into a dangerous place to work.

"Granting for the sake of argument, not actually of course, but just for the sake of argument, the contention that there was on Bass and McQuay (the owner) the duty to furnish a reasonably safe place to work, the Court holds that they complied with that duty when they erected this barrier as it has been referred to here, and put up signs, which everybody has testified in this case said made it a reasonably safe place to work, particularly for skilled electricians.

"The record shows that B and G Construction Company for their own purposes and nobody else's, tore that barrier down, although there is some dispute as to when it was done. I think from the preponderance of the testimony it indicates that it was done very shortly before the accident happened, either the afternoon or morning before the accident."

to B & G that amount, the check reciting that it was "in full settlement of judgment * * * ."

The appellee, Bass, insists that B & G, having accepted the part of the judgment in its favor, cannot take and prosecute an appeal from the part of the judgment adverse to it. The answer to that insistence is that B & G was entitled to that much of its demand in any event, irrespective of the outcome of the appeal.[2]

Appellant B & G presents four propositions:

1. Since Henderson's suit against Bass was based upon the theory that he was injured as the result of negligence on the part of Bass and not as the result of negligence on the part of B & G, can B & G be liable for indemnity for the attorney's fee incurred in defending that suit? As has been stated, the district court found that factually Bass was guilty of no negligence, and that the negligent act charged to Bass was committed by B & G resulting in Henderson's injury. It follows that the negligence of the subcontractor B & G caused Bass to incur the attorney's fee to defend Henderson's suit. The terms of the indemnity agreement are broad enough, we think, to cover expenses incurred by reason of the negligence of B & G, even though the injured party erroneously ascribed such negligence to Bass.

2. Appellant insists that, since the district court found in favor of Bass as against Henderson, Bass needed no further protection. Bass had, however, incurred the

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2 See Gilfillan v. McKee, 159 U.S. 303, 311; Kaiser v. Standard Oil Co., 5th Cir. 1937, 89 F.2d 58, 59; 2 Am.Jur. Appeal & Error, §215; 4 C.J.S. Appeal & Error, §216(c).

expense of the attorney's fee to defend Henderson's action, which was based, in fact, upon a negligent act committed by B & G. Bass needed to be protected or indemnified for that attorney's fee.

3. The agreed statement of the case upon which this appeal is submitted[3] does not show payment by Bass of the attorney's fee. Is the contract one strictly for indemnity, upon which judgment can be awarded only after actual payment?

> "Where the contract is strictly one of indemnity, that is, one against loss or damages, the indemnitee cannot recover until he has made payment or otherwise suffered an actual loss or damage, against which the covenant runs; * * *."

42 C.J.S. Indemnity, §14c, p. 589. See also 27 Am. Jur. Indemnity, §21, p. 470.

A careful reading of the indemnity provision of the contract shows that B & G agreed both to "protect and indemnify"[4] Bass "against any loss or damage suffered by anyone arising through the negligence of * * *" B & G. There was no prerequisite that the "loss or damage" should be sustained by the indemnitee, Bass, but the "loss or damage" might be suffered "by anyone", including Henderson. Further, B & G agreed to "bear any expense which the contractor may have by reason thereof, or on account of being charged therewith." "Bear any expense" meant that B & G was not only to pay but was

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3 See Rule 76, Federal Rules of Civil Procedure.

4 Compare Somers Coal Co. v. United States, E.D. Ohio 1942, 70 F.Supp. 1009, 1010.

permanently to sustain any expense.[5] "Any expense" includes, of course, attorney's fees.[6] There is no condition attached to the obligation to bear such expense. As to the words "may have," in ordinary usage a person "has" an expense when it is incurred. The phrases "by reason thereof, or on account of being charged therewith" refer back to "any loss or damage suffered by any one arising through the negligence of * * *" B & G. Bass had the expense of the attorney's fee by reason of Henderson's injury which arose through the negligence of B & G. Further, Bass had that expense on account of being charged with a negligent act in fact committed by B & G which had resulted in Henderson's injury. We think that, both within the literal language of the indemnity provision and according to the intention of the parties, there was no requirement that the attorney's fee be actually paid before B & G could be called on to carry out its contract. Compare *Dickson v. United States Fidelity & Guaranty Co.*, Miss. 1928, 117 So. 245, 247-248.

4. Finally, the appellant calls attention that, according to the written contract, the indemnitee was a *partnership* styled G. E. Bass & Company, while judgment was rendered in favor of G. E. Bass & Company, Inc. Appellee's counsel states that he is "frankly surprised," "This is our first knowledge or any intimation of error in the names of parties. The question was never raised in the trial court and never called to the trial court's attention." In response, the best that appellant's counsel can do is to quote from the points relied upon as expressed in the

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5 See Stevenson v. Mellor, 252 Pa. 219, 97 Atl. 393, 394.

6 42 C.J.S. Indemnity, §13d, p. 586.

agreed statement of the case on appeal.[7] Those quotations do not pin point the discrepancy. There is no showing that either the district court or opposing counsel were fairly apprised upon the trial. If that had been done, it is probable that the discrepancy might have been removed by amendment or otherwise, for there was but one prime contractor whether a partnership or incorporated. Cf. *Grandey v. Pacific Indemnity Co.*, 5th Cir. 1954, 217 F.2d 27. The question cannot be raised for the first time on appeal. *United States v. Sinor*, 5th Cir. 1956, 238 F.2d 271, 277.

Even more conclusive is the fact that the agreed statement of the case on appeal refers to the contract as being "between B & G Electric Company and G. E. Bass & Company, Inc." That stipulation precludes the appellant from making a contrary contention.

We find no reversible error in the record and the judgment is

AFFIRMED.

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7 Quoted as follows in appellant's reply brief:

"'There was no contract nor common law obligation on the part of B & G Electric Company to defend the suit for G. E. Bass & Company, Inc. nor to pay its expenses in defending such suit.

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"'There was no proof that G. E. Bass and Company (Note: **not G. E. Bass & Company, Inc**) had sustained the expense or paid the attorney's fee in question.

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"'There was no obligation on the part of B & G Electric Company by contract or otherwise to reimburse G. E. Bass and Company, Inc. or its surety for this expense or to assume its obligation in the premises.'"

APPENDIX B.

JUDGMENT

Extract from the Minutes of February 25, 1958.

B & G ELECTRIC COMPANY

No. 16936. **versus**

G. E. BASS & COMPANY, INC.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, B & G Electric Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX C.

ORDER DENYING REHEARING

Extract from the Minutes of April 1, 1958.

B & G ELECTRIC COMPANY

No. 16936. **versus**

G. E. BASS & COMPANY, INC.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.